Petition

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Supreme Court, U.S.
FILED
APR 13 1982
ALEXANDER L. STEVAS
CLERK

81-1916

No. 81-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ROBERT LAWRENCE RIEGLER,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA,
FIFTH APPELLATE DISTRICT

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QUESTIONS PRESENTED

1. Does the contemporaneous search requirement for packages seized from vehicles pursuant to a lawful arrest apply to situations where the packages have already been lawfully searched by the police?

2. Do recipients of packages sent through the international mails have a constitutionally protected expectation of privacy in the unlawful contents of the packages after the packages have been subjected to a lawful customs search and then delivered to the addressee by the police under controlled conditions and constant surveillance?

3. After a search warrant has issued to search a residence for a particular package known to contain contraband, does the Fourth Amendment obligate the police to obtain a second search warrant to open the package when the package is lawfully seized

at a place other than the residence described in the warrant?

4. Assuming for the sake of argument that a second search warrant was required in this case, is the exclusionary rule applicable when government agents act under a good faith belief that an additional warrant was unnecessary because of a prior customs search of the packages and the existence of a warrant authorizing them to search for and seize the contents of the packages?

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OPINION BELOW

The opinion of the California Court of Appeal, Fifth Appellate District, which may be found at 127 Cal.App.3d 317,179 Cal.Rptr. 530 (1981), appears as Appendix "A" to this petition.

JURISDICTION

The petitioner, the People of the State of California, respectfully prays that a writ of certiorari issue to review the judgment of the California Court of Appeal, Fifth Appellate District, which was entered in this proceeding on December 30, 1981. The Court of Appeal denied petitioner's petition for rehearing on January 21, 1982 (Appendix "B"), and the decision became final as to that court on January 29, 1982. (Rules 24(a) and 28, California Rules of Court.) The California Supreme Court denied the People's petition for hearing (two justices voted to grant hearing) on March 17, 1982 (Appendix "C"). On March 19, 1982, the Court of Appeal ordered the issuance of the remittur stayed (Appendix "D").

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violates, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment XIV:

> " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

A. Proceedings in the State Court

Respondent Riegler was charged in the Superior Court of the State of California, in and for the County of Merced, with possession of marijuana for sale and transportation of marijuana (CT 423). He pled

not guilty and moved to suppress the evidence (CT 424-448). After a hearing, the superior court denied the motion to suppress. Thereafter, respondent pled guilty to possession of marijuana for sale (California Health and Safety Code, § 11359) and the additional charge was dropped (CT 450-452).

On appeal, respondent challenged the denial of his motion to suppress the drugs. The Court of Appeal of the State of California, Fifth Appellate District, by published decision filed October 30, 1980, reversed appellant's conviction on the ground that the suppression motion should have been granted. (People v. Riegler, 111 Cal.App. 3d 580, 168 Cal.Rptr. 816 (1980).)

The People of the State of California petitioned for rehearing on November 14,

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1980, but rehearing was denied on November 25, 1980 (Justice Andreen was of the opinion rehearing should have been granted).

The petition for hearing was timely filed in the California Supreme Court on December 8, 1980, and denied on December 24, 1980 (Justices Mosk, Clark and Richardson voted to grant a hearing).

On February 5, 1981, at the request of the State of California, Justice Rehnquist stayed the judgment of the Court of Appeal (No. A-659). (49 U.S.L.W. 3559.)

On February 21, 1981, the State of California petitioned this Court for a writ of certiorari (No. 80-1421).

On July 2, 1981, this Court granted the petition for a writ of certiorari, vacated the judgment and remanded the case to the Court of Appeal of California, Fifth Appellate District, for further considera-

tion in light of New York v. Belton (No. 80-1421).

On remand, the Court of Appeal (Justice Andreen dissenting) by published opinion filed December 30, 1981, ruled that Belton did not apply to this case and that respondent's conviction should be reversed on the ground that the suppression motion should have been granted (Appendix A).

The People of the State of California petitioned for rehearing, but the petition was denied by a vote of 2-1, without opinion on January 21, 1982 (Appendix B).

On February 8, 1982, the People timely petitioned the State of California for a hearing, but the petition was denied on March 17, 1982 (Justices Richardson and Kaus voted to grant a hearing). (Appendix C.)

On March 19, 1982, the People requested the Court of Appeal, Fifth Appellate

District, to stay the issuance of the remittitur to allow them to file this petition for writ of certiorari. The petition was granted and the issuance of the remittitur was stayed. (Appendix D).

The People are informed and believe that respondent Riegler has been released on bail pending appeal to remain at liberty.

B. Statement of the Facts

On November 8, 1977, specially trained police dogs alerted U.S. Customs officials to the possible presence of marijuana in two packages mailed from Germany to Merced, California. Pursuant to customs laws, officials of the post office and the Drug Enforcement Administration opened the packages and confirmed that they contained hashish. The packages were then resealed and sent to authorities in California (CT 287-292).

Working together, postal authori-

ties and local Merced officials arranged for a controlled delivery of the packages to the addressee, and obtained a search warrant[1/] authorizing them to enter that residence and, inter alia, search for and seize the packages and their contents (CT 85-87, 148, 319-320, 375-376). In order to allow the occupants of the residence time to open the packages and exercise dominion over the contents, the police did not immediately execute the search warrant after the delivery of the packages (CT 85-89, 148, 157-160, 249, 277, 319-320, 375-376).

Approximately 15 minutes after the packages were delivered, respondent Riegler and two companions arrived at the residence, and, after a short interval, Riegler and

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1. At oral argument on December 4, 1981, the parties stipulated the search warrant, supporting documents, and the return to the search warrant would be in the record on appeal.

another person left with the packages in a Volkswagen (CT 325-326, 336-340). While some police remained at the Fortner residence and executed the search warrant, other officers followed Riegler and his companion for two hours in the hope that they would lead them to other suspects. Finally, as the suspects approached the San Francisco Bay Area during the rush hour, the police, fearful they would lose the suspects in the heavy traffic, stopped the Volkswagen and arrested Riegler and his companions. The packages, which were in plain view in the back seat of the Volkswagen, were seized at the time of the arrest. The packages were in the same condition as they were before the delivery (CT 93, 131, 214-218, 227, 231-237, 322-325).

The packages were transported to Merced that evening where they were photographed and then opened and inventoried (CT 284-255).

A second search warrant was not obtained before the packages were reopened. The hashish was still in the packages. The street value of the hashish was $100,000.

It was stipulated that the suspect substance was concentrated cannabis or hashish (CT 348-349).

The contents of the packages and their wrappings were listed in the return to the search warrant.

ARGUMENT

I

THE COURT OF APPEAL'S LITERAL INTERPRETATION OF THE CONTEMPORANEOUS REQUIREMENT FOR SEARCHES INCIDENT TO AN ARREST IS UNFOUNDED AND ERRONEOUS

The Court of Appeal found that although appellant was lawfully arrested and the packages were lawfully seized from the vehicle, the packages were illegally opened because the opening was not contemporaneous with the arrest. This holding purports to be an application of this Court's decision in New York v. Belton (1981) ____U.S.____, 69 L.Ed.2d 768, 101 S.Ct. 2860. Petitioner submits the Court of Appeal's literal and narrow reading of Belton is inapplicable to the facts of this case and contrary to the rationale of Belton.

On June 30, 1981, this Court decided two cases dealing with searches of containers found in the automobiles of suspects.

(Robbins v. California (1981) ____U.S.____ 69 L.Ed. 744, 101 S.Ct. 2841, and New York v. Belton, supra, ____U.S. ____, 101 S.Ct. 2860, 69 L.Ed.2d 768.)

In Belton, this Court held that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment and any containers therein. (____U.S.____, 69 L.Ed. 2d at 775, 101 S.Ct. at p. 2864.) The rationale of such a search is that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have. (Id., emphasis added.) Since a custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment, a search incident to the arrest requires no additional justification. (____U.S.____, 101 S.Ct. at 2864, 69 L.Ed.2d at 775-776.)

In Robbins, this Court held that the occupants of an automobile had a constitutionally protected privacy interest in the contents of the trunk of a vehicle.

Belton and Robbins are a reflection of this Court's attempts to balance the interests involved in the application of the exclusionary rule. (Stone v. Powell (1976) 428 U.S. 484, 486-488; United States v. Calandra (1974) 414 U.S. 338.)

It is true that the search of the packages did not occur at the exact moment of the arrest. But this truism overlooks obvious differences in the cases. Here the police had seen the packages before the arrest and the contents of the packages were known to government authorities to such a degree that they had obtained a search warrant for the packages.

The general rule of Belton that containers in passenger compartments may be

searched pursuant to custodial arrests is clearly applicable to this case and justified the re-opening of the packages. The requirement of a contemporaneous search is not applicable to the present situation where the police had seen the packages at the post office in New York, at Merced and at the time of the arrest. Expectations of privacy in the contents of the packages dissipated when the packages were mailed through customs, when a search warrant for the packages was obtained, and when appellant and his companion were placed under custodial arrest.

The contemporaneous search restriction is designed for first encounters between the police and suspects. The restriction is inapplicable when, as here, the packages and their contents were already examined by the police and the police have already obtained search warrants for the packages and their contents.

In the Court's opinion, Justice Stewart reiterated the need for a workable standard to guide officers who had only limited time and expertise when confronted with specific circumstances and the need to make a decision. (New York v. Belton, supra, ____U.S.____, 69 L.Ed.2d at 774

However, concurring in Robbins, Justice Powell expressly stated that Robbins, Belton and the container cases established

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general rules for which exceptions could and would occur:

> "The plurality's approach today departs from this basic concern with interest in privacy, and adopts a mechanical requirement for a warrant before police may search any closed container. Nothing in Chadwick or Sanders justifies this extreme extension of the warrant requirement. Indeed, the Court in Sanders explicitly foreclosed that reading: 'There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not. Our decision in this case means only that a warrant generally is required before personal luggage can be searched and that the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile.' 442 U.S., at 765, n. 13, 99 S.Ct., at 2593." (Robbins, supra, ___ U.S. ___, 101 S.Ct. at 2849.) (Emphasis added.)

Petitioner submits the instant case should be employed to establish a limited corollary to the Belton rule: if, pursuant

to an arrest, the police seize packages from the passenger compartment of a vehicle and the packages have been subject to a previous lawful government search, the packages need not be reopened contemporaneously with the arrest.

II

AFTER A CUSTOMS SEARCH OF PARCELS SENT THROUGH THE INTERNATIONAL MAILS THE RECIPIENTS OF THE PACKAGES HAVE NO CONSTITUTIONALLY PROTECTED EXPECTATION OF PRIVACY IN THE CONTENTS OF THE PACKAGES

On the basis of this Court's opinions in United States v. Chadwick (1977) 433 U.S. 1, Arkansas v. Sanders (1979) 442 U.S. 753, and Walter v. United States (1980) ___U.S.___, 100 S.Ct. 2395, 65 L.Ed.2d 410, the California Court of Appeal has erroneously concluded that the recipients of packages which have been subjected to a lawful warrantless customs search retain an expectation of privacy in the contents of the packages.

The Court of Appeal's misinterpretation of Chadwick, Sanders and Walter, involves substantial questions of a recurring nature involving the Fourth Amendment and federal customs searches.

This Court recently upheld the

constitutionality of customs searches of letters and parcels sent through the international mails. (United States v. Ramsey (1977) 431 U.S. 606.) When contraband is discovered during the course of a customs search, government agents frequently defer seizure of the contraband until by means of surveillance and a controlled delivery they identify those responsible for its unlawful importation. (United States v. Martinez (5th Cir. 1973) 481 F.2d 214, 218; United States v. Smith (9th Cir. 1980) 629 F.2d 1301; United States v. Bulgier (7th Cir. 1980) 618 F.2d 472.)

In this controlled delivery situation several federal circuits have held that a search warrant is unnecessary to reopen the containers either because the contraband remains "constructively seized" (United States v. DeBerry (2d Cir. 1973) 487 F.2d 448, 451; United States v. Andrews

(10th Cir. 1980) 618 F.2d 646), or because the reopening of the containers is part of a continuous transaction or extended border search. (United States v. Bulgier, supra, 618 F.2d at 478; United States v. Smith, supra, 629 F.2d 1301; United States v. Martinez, supra, 481 F.2d at 218; United States v. Bilir (4th Cir. 1979) 592 F.2d 735; United States v. Lowe (6th Cir. 1978) 575 F.2d 1193; see also State v. Edwards (1977) 197 Neb. 354, 248 N.W.2d 775; McConnell v. State (1979) Alaska, 595 P.2d 147, 153-155.)

The Fifth Circuit has expressly applied the extended border search doctrine to post-delivery searches of mail. It has also formulated criteria for determining the reasonableness of post-delivery searches of mail:

> "Thus, we apply this circuit's extended border search doctrine to searches of mail and conclude that such a warrantless search is reasonable (a) when it is established by a preponderance of the evidence that

> the mail has crossed the border; (b) when it appears with reasonable certainty that the mail's contents have not been altered since it entered th United States and, (c) if the search occurs after delivery of the mail to the addressee, when the government agents who made the search had a reasonable suspicion of smuggling activity." (U.S. v. Richards (5th Cir. 1981) 638 F.2d 765 at 77, cert.den. ____U.S.____(1981).)

Petitioner submits the instant case is within the guidelines of Richards and that the search of the packages was reasonable and invaded no constitutionally protected privacy interests.

Although the search of the packages in this case was within the ambit of the Richards criteria, the Court of Appeal held the packages were no longer subject to a warrantless search because they had been delivered to the addressee. In so ruling, the Court of Appeal was directly in conflict with the federal cases cited which uphold extended border searches where constant

surveillance and controlled delivery insure that the contraband remains with the suspects.

The Court of Appeal's erroneous ruling is in part a result of its misinterpretation of Walter v. United States (1980) 447 U.S. 649.

In Walter, the majority, on First and Fourth Amendment grounds, held that a limited search of film parcels by private parties did not authorize government agents to screen the films without first obtaining a search warrant. The warrantless screening of the films was held to constitute a more intensive search of an exploratory or general nature.

This case differs from Walter in several respects. There was no screening of films or reading of messages that would introduce First Amendment considerations into the case. The initial search was lawfully

conducted by government agents and it acted to deprive the recipients of the packages of any vestigial privacy interest in their contents. The second search did not exceed the scope of the initial search and merely constituted an inventory search rather than a general exploratory search. (See the discussion of Walter in United States v. Buettner-Janusch (2d Cir. 1981) 646 F.2d 759, fn. 10 at 767.)

Nothing in Walter or United States v. Chadwick (1977) 433 U.S. 1, supports the Court of Appeal's conclusion that citizens have an expectation of privacy in the contents of containers which have already been subjected to a lawful warrantless search by government agents.

The Court of Appeal's erroneous ruling is partially attributable to its misinterpretation of People v. Whyte (1979) 90 Cal.App.3d 235, 152 Cal.Rptr. 280,

cert. den. 444 U.S. 818. Whyte involved a customs search and a controlled delivery of contraband to the outside of a building housing several businesses. After the parcels were moved inside the business, the officers entered the business without a warrant, reseized the parcels and later reopened them. The evidence was ordered suppressed in Whyte because the officers needed a search warrant to authorize them to infringe on the privacy interests of the owners of the various businesses. (See People v. Matthews (1980) 112 Cal.App.3d 11, 24, 169 Cal.Rptr. 263.)

Petitioner does not contest the apparent rationale of Whyte that the police may not use a controlled delivery as a pretext for the warrantless invasion of the homes or businesses of third persons. However, that situation is not present in this case where the police had complied with Whyte by obtaining a search warrant for the

Fortner residence. As events unfolded herein however, the packages were lawfully seized in appellant's automobile. (Harris v. United States (1968) 390 U.S. 234, 235.) Since the packages were in their original wrappings and had not been reopened, and since this was a continuous transaction with the contraband remaining in the constructive possession of the agents, there was no need to obtain a search warrant to authorize the officers to reopen the packages.

An additional basis for the warrantless reopening of these parcels is that the prior search of the packages had created a situation analogous to "plain view". Since the officers knew from the outward appearance of the packages that they were the ones which contained the contraband, a search warrant was unnecessary. (Arkansas v. Sanders, supra,

442 U.S. 753, at 764-765; fn. 13; U.S. v. Gibson (CA DC 1980) 636 F.2d 761, 763.)

III

ONLY ONE SEARCH WARRANT IS CONSTITUTIONALLY REQUIRED TO OPEN CONTRABAND EVEN THOUGH THE EVIDENCE IS LAWFULLY SEIZED AT A DIFFERENT LOCALE THAN THAT DESCRIBED IN THE WARRANT

Assuming for argument's sake that a search warrant was necessary to authorize the police to reopen the packages, petitioner submits the Court of Appeal erred in concluding the original search warrant did not authorize the police to reopen the sealed packages.

It is indisputable that the police lawfully seized the packages in plain view at the time of respondent's felony arrest in his automobile. (See Harris v. United States, supra, 390 U.S. 234, 235; Chambers v. Maroney (1970) 399 U.S. 42, 52.)

The police had a search warrant authorizing them to search the Fortner residence for the packages and to seize the packages,

their wrappers and contents. It is only reasonable to infer that this search warrant authorized the officers to open the packages.[2/]

It is absurd to conclude this warrant somehow expired because by chance the packages were not seized at the Fortner residence but in respondent's automobile at the time of the arrest.

The Fifth Circuit has considered this issue on several occasions. It's reasoning is cogent and highly persuasive. In upholding the search of an automobile under conditions remarkably similar to those herein, the court stated:

> "There can be little, if any, doubt that the intent of the officers in this instance was to seize the controlled package

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2. This is certainly the inference drawn by the officers as they included the wrappings and contents of the packages in the Return to the Search Warrant.

> and its contents wherever they might be on the premises . . . , whether when taken from the mailbox they were carried inside the house, retained on the front porch, carried down the steps to the sidewalk, taken to the yard, or removed to an outbuilding or to a vehicle on the premises. The object of the search was movable contraband. A controlled search for it could not effectively be commenced until after it had been removed from the mailbox by someone. The ultimate or immediate destination of the movable contraband, when removed from the mailbox and actually moving, was neither known nor knowable in advance." (U.S. v. Napoli (5th Cir. 1976) 530 F.2d 1198, 1200, 1201, cert.den. 429 U.S. 920; U.S. v. Cole (5th Cir. 1980) 628 F.2d 897, 899-900.)

Petitioner submits this Court should adopt a rule recognizing that when moveable contraband is delivered in a controlled search, it is impossible to describe beforehand in a search warrant affidavit every conceivable place or vehicle where the contraband could be placed. When, as in this case,

a nexus is established between a vehicle and the contraband, a warrant authorizing a search of the place of the delivery, should be construed to authorize a search of the vehicle, limited only by the nature of what is being searched for. (U.S. v. Cole, supra, 628 F.2d 899.) Then, as long as the police lawfully seized the packages, the search warrant they had obtained would authorize them to open the packages.

Respondent's contention that a second search warrant is required is analogous to saying a separate search warrant is required for each container within a larger container. The federal courts have had no trouble dismissing such contentions as mere pedantry. (United States v. Callison (8th Cir. 1978) 577 F.2d 53, 55, cert. den., 439 U.S. 873; United States v. Kralik (10th Cir. 1979) 611 F.2d 343, 345; United States v. Morris (S.D. Georgia 1980) 491

F.Supp. 222; United States v. Abrahams (S.D.N.Y. 1980) 493 F.Supp. 310.)

In this case, to require the police to obtain a second search warrant based on the same probable cause as the first warrant will not enhance any of the rights of privacy or personal freedom that the Fourth Amendment seeks to protect. It will only create needless, repetitious work for courts and magistrates and strain our already overburdened legal system. It will also most assuredly confuse the police as to their obligations in regard to securing search warrants and needlessly require them to cope with legal refinements that strain credulity and defy reason.

IV

ASSUMING THE SEARCH WARRANT DID NOT AUTHORIZE THE OFFICERS TO REOPEN THE PACKAGES, THE EXCLUSIONARY RULE SHOULD NOT BE APPLIED BECAUSE OF THE OFFICERS' GOOD-FAITH BELIEF THEY WERE AUTHORIZED TO OPEN THE PACKAGES

In this case, the arrest and search of the packages occurred on November 22, 1977. United States v. Chadwick (1977) 433 U.S. 1, had been decided only five months earlier, on June 22, 1977. The scope of Chadwick and its applicability to an automobile search was still an open question. Arkansas v. Sanders (1979) 442 U.S. 753 was not decided for another two years. It would be four years before Belton and Robbins would be decided.

Additionally, the officers could not be expected to foresee that a court would one day require the police to obtain two search warrants before they could reopen

packages. The officers in this case clearly acted in the good faith belief they were proceeding pursuant to a lawful search warrant: they included an inventory of the contents of the packages in their return to the search warrant.

Ignoring the fact that the rules it is applying to the officers did not exist at the time of the search, the Court of Appeal gratuitously proclaimed "officers are required to play by the rules" (Slip Opinion, p. 13).

> "If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." (U.S. v. Peltier (1975) 422 U.S. 531, at 542.)

Many courts have recognized that the values of the Fourth Amendment and the goals of the exclusionary rule are not fostered

when evidence is exluded because of technical violations resulting from a good-faith mistake of police officers. (See generally, Bernardi, The Exclusionary Rule: Is A Good Faith Standard Needed To Preserve A Liberal Interpretation Of The Fourth Amendment?; 30 De Paul L. Rev. 51 (1980).

In United States v. Williams (5th Cir. 1980) 622 F.2d 830, cert. denied 449 U.S. 1127 (1981), a case involving a federal officer's good faith mistake about his power to arrest, the United States Court of Appeals for the Fifth Circuit declared:

> "Sitting en banc, we now hold that evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken belief that they are authorized." (Id. at 840.)

State judges in Virginia, Holloman v. Commonwealth (Va. 1981) 275 S.E.2d 620, 622; Abell v. Commonwealth (Va. 1980) 272 S.E.2d

204, 210, and Florida, Walden v. State (Fla. Ct.App. 1981) 397 So.2d 368, 369, have expressed their willingness to follow Williams were they free to do so. In June, 1981, the Colorado legislature enacted a good faith Exclusionary Rule. (C.R.S. 1973, § 16-3-308.) The American Law Institute, Model Code of Pre-Arraignment Procedure, Proposed Official Draft No. 1, § 290.2 (1972), and the Attorney General's Task Force on violent crime, Final Report, § 40 (1981), have urged similar reforms.

State Courts have also shown increasing reluctance to suppress evidence seized pursuant to defective warrants seized pursuant to probable cause. People v. Lent (N.Y. Sup. Ct. 1980) 433 N.Y.S.2d 538, upheld a search incident to an arrest pursuant to a warrant which, unknown to the arresting officer, had been withdrawn. Richmond v. Commonwealth (Ky. 1981) ____S.W.2d____,

50 U.S.L.W. 2162, refused to exclude evidence obtained by a search under a warrant issued by a judge while outside his territorial jurisdiction. People v. Arnow (N.Y. Sup. Ct. 1981) 436 N.Y.S.2d 950, characterized a magistrate's failure to endorse a warrant for nighttime service as a "technical defect" not requiring exclusion of evidence. Sternberg v. Superior Court (1974) 41 Cal.App. 3d 281, declined to suppress evidence because a magistrate had inadvertently neglected to sign the warrant after finding probable cause. Each opinion emphasized the good faith reliance of the police.

The "good faith mistake" exception includes both reasonable mistakes of law and of fact. Mr. Justice White has articulated its rationale:

> "When law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the

> exclusion can have no deterrent effect. The officers, if they do their duty, will act in similar fashion in similar circumstances in the future. . . ." (Stone v. Powell (1976) 428 U.S. 465, 540 (dissenting opinion of White, J.).)

Petitioner submits this is a most appropriate case for the application of a good faith exception to the exclusionary rule for searches conducted pursuant to warrants defective due to minor technicalities. The Court of Appeal's decision should therefore be reversed and respondent Riegler's conviction reinstated.

CONCLUSION

The decision of the California Court of Appeal is a serious erosion of the bulwarks of the interpretation and application of the Fourth Amendment: reasonableness and the avoidance of hypertechnical rules. The obsessive formalism of the decision imposes an impossible burden on law enforcement. It serves no legitimate privacy

interests and should not be allowed to stand. We respectfully submit that a writ of certiorari should issue to review the decision of the Court of Appeal

Respectfully submitted,

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RMG:mls
81US0001
4-9-82

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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,	) 5 Crim. No. 4230
Plaintiff and Respondent,	) (Super. Ct. No. 9648)
v.	) O P I N I O N
ROBERT LAWRENCE RIEGLER,	)
Defendant and Respondent.	)

APPEAL from a judgment of the Superior Court of Merced County. Donald R. Fretz, Judge. Reversed.

Duane, Lyman & Seltzer and Eugene Seltzer for Defendant and Appellant.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General, Arnold O. Overoye, Assistant Attorney General, Roger E. Venturi and Ramon M. de la Guardia, Deputy Attorneys General, for Plaintiff and Respondent.

The United States Supreme Court

Court granted respondent's petition for a writ of certiorari, vacated this court's previous opinion and remanded the matter for further consideration in light of New York v. Belton (1981) ____U.S.____[101 S.Ct. 2860]. Pursuant to the high court's command, we have reconsidered the matter, and conclude the Belton rule permitting a warrantless search of the passenger compartment of an automobile and containers found therein when incidental to a lawful arrest, is inapplicable to this case. Accordingly, we again reverse the judgment.

The facts are these:

On November 8, 1977, a customs inspector at JFK Airport in New York City notified John Juber, a special agent with the Drug Enforcement Administration, that a detector dog had alerted the inspector to two packages sent from Germany and when the inspector opened them up he observed what he

believed to be hashish, Chemical analysis confirmed the substance was hashish. Chemical analysis confirmed the substance was hashish.

The packages were addressed to Michael and Selma Fortner, 1130 W Street, Merced, California.

The packages were resealed by the customs agent and Huber sent the packages to Patrick Dorn, a United States postal inspector in Fresno, who received them on November 21, 1977.

Dorn brought the packages to Merced and contacted a Lieutenant Moore who was in charge of Specialized Manpower Assigned to Crime Control (SMACC) in Merced County. Huber also had contacted Moore on November 21, 1977, and told him about the packages.

The plan was to have a controlled delivery, and on November 22, 1977, Agent Atkins with SMACC obtained a warrant to search the premises at 1130 W Street and

any packages and wrappings located therein addressed to Michael and Selma Fortner.

On November 22, Lieutenant Moore and other agents took up surveillance at the Fortner residence. At approximately 1:30 p.m. Dorn gave the parcels to the regular mail carrier who delivered the parcels at approximately 1:40, and Michael Fortner took them into the house.

About 10 to 15 minutes after the delivery of the packages a red Volkswagen driven by appellant and with a passenger pulled into the driveway at the Fortner residence. A few minutes later appellant placed the packages in the back of the Volkswagen and drove away.

Lieutenant Moore testified that between 1:40 p.m. and 2:11 p.m., when appellant left with the packages, nothing prevented Moore from going into the residence to execute the warrant. Moore did not im-

mediately serve the warrant because he wanted to wait for the occupants to have time to open the packages. He was also interested in where the hashish was going if it left the residence. He wanted to ascertain who else was involved in the case and whether he could arrest more people. He would follow suspects wherever they went, including on a plane.

After the Volkswagen left, the warrant was executed and served on Mike Fortner at 2:30 p.m., and the house searched, but nothing incriminating was found. Agent Austin overheard Michael Fortner on the phone say that a couple of packages came for Bob and "I gave them both to Bob."

The search warrant was restricted to the premises, structures, rooms and receptacles of the Fortner residence at 1130 W Street, Merced, and did not provide for the search of any vehicle or persons.

When appellant's Volkswagen left the Fortner residence, several SMACC agents including Moore, along with Postal Inspector Dorn, followed. Although several opportunities existed to stop the Volkswagen and detain the occupants, the officers chose not to do so until approximately 4:05 p.m. The vehicle was stopped in Contra Costa County about 100 miles from the Fortner residence. The reason for the stop was the fear of losing surveillance in the East Bay traffic.

Appellant and his passenger exited the vehicle and were arrested, handcuffed and removed from the scene before the parcels were removed from the backseat of the Volkswagen. The packages were identified as being the same ones previously delivered to the Fortner residence. The arrestees were booked into a Contra Costa jail.

The packages were placed unopened

into a police vehicle and taken back to the SMACC office in Merced where they were photographed, opened and found to contain hashish. The search of the packages was about five hours after they were seized from the Volkswagen. No search warrant was obtained before the opening. Moore testified that when he took the packages back from Contra Costa County to the Merced office, he had no fear that something would happen to the packages.

DISCUSSION

In New York v. Belton, supra, ____U.S. ____ [101 S.Ct. 2860], a New York state trooper driving alone in an unmarked car was passed by a speeding car. The trooper gave chase and forced the car to pull over. It soon became evident that none of the four occupants of the car owned the vehicle or was related to its owner. Menwhile, the officer had smelled burning marijuana

and had seen an envelope on the floor of the car marked "Supergold" which the officer associated with marijuana. The four men were directed to exit the vehicle and were arrested for possession of marijuana. The trooper patted the four occupants down and tried to split them up from each other so they could not be in physical contact. The suspects were all by the side of the car when the trooper then searched the interior of the car, found Belton's jacket, unzipped the pocket, and discovered cocaine therein which became the subject of the prosecution in the case (New York v. Belton, supra, 101 S.Ct. at pp. 2860-2861).

The United States Supreme Court reversed the New York Court of Appeal which had ordered suppression of the evidence on the theory that a "warrantless search of the zippered pockets of an unaccesible jacket may not be upheld as a search in-

cident to a lawful arrest where there is no longer any dnager that the arrestee or a confederate might gain access to the article." (Id., at p. 2862.)

Justice Stewart emphasized the need for a single, familiar standard as essential to the guidance of police officers who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront. (Id., at p. 2863.) In United States v. Robinson (1973) 114 U.S. 218, 236, according to Justice Stewart, the court attempted to articulate a straightforward rule that could be easily applied and predictably enforced. (New York v. Belton, supra, at p. 2862.) However, no straightforward rule emerged following Robinson in respect to the question of the proper scope of the search of the interior of an automobile incident to a lawful

custodial arrest of its occupants. (Ibid.) Therefore, Belton relying on the principles of Chimel v. California (1969) 395 U.S. 752, held that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. (New York v. Belton, supra, 101 S.Ct. at p. 2864.) While conducting the search incident to an arrest, the police may also examine the contents of any contianers found within the passenger compartment because if the passenger compartment is within the reach of the arrestee, so also are the containers that are therein.[1/]

1/ In footnote 4 of Belton at page 2864, the Supreme Court defined container as follows. "'Container' here denotes any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like. Our holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk." (Emphasis added.)

(Ibid.)

In the instant case the packages in question were sitting on the backseat of the Volkswagen. Thus, under Belton the police had the right to seize the search those packages incident to the arrest of the occupants of the Volkswagen. However, a problem arises because the officers did not open the packages at the time of the seizure and the arrest; rather, the officers delayed the opening of the packages until some four to five hours later after they had been seized. As we shall explain, this delay is fatal to the officers' right to open the packages without a warrant.

Belton carefully distinguished United States v. Chadwick (1977) 433 U.S. 1 and Arkansas v. Sanders (1979) 442 U.S. 753, relied on by the New York Court of Appeal in holding the search constitutionally invalid, on the ground that neither case involved a

search incident to a lawful custodial arrest. "As the Court pointed out in the Chadwick case, 'Here the search was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody; the search therefore cannot be viewed as incidental to the arrest or as justified by any exigency.' [Citation.] And in the Sanders case, the Court explicitly stated that it did not 'consider the constitutionality of searches of luggage incident to the arrest of its possessor. (See, e.g., United States v. Robinson, 414 U.S. 118 . . . (1973). The State has not argued that respondent's suitcase was searched incident to his arrest and it appears that the bag was not within his "immediate control" at the time of the search.'" (New York v. Belton, supra, 101 S.Ct. 2860 at p. 2865.)

Belton clearly implies an automobile

container search must occur immediately to be considered as incident to the arrest. "It is not questioned that the respondent was the subject of a lawful custodial arrest . . . . The search of the respondent's jacket followed immediately upon that arrest. . . . The search of the jacket, therefore, was a search incident to a lawful custodial arrest . . . ." (Id., at p. 2865.)[2/]

2/ Several other United States Supreme Court cases have reflected on the meaning of contemporaneous. In Preston v. United States (1964) 376 U.S. 364, 367-368, which involved the search of car rather than its contents, the court declared:

"The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime--things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not

(Fn. continued.)

The California Supreme Court has also indicated the warrantless search of containers found in automobiles must be contemporaneous with the arrest. In People v. Minjares (1979) 24 Cal.3d 410, 420-421, the court states:

> "The cardinal principle of the Fourth Amendment is that a warrant

---

incident to the arrest. [Citation.] Here, we may assume, as the Government urges, that, either because the arrests were valid or because the police had probable cause to think the car stolen, the police had the right to search the car when they first came on the scene. But this does not decide the question of the reasonableness of a search at a later time and at another place. See Stoner v. California, 376 U.S. 483, 84 S.Ct. 889. The search of the car was not undertaken until petitioner and his companions had been arrested and taken in custody to the police station and the car had been towed to the garage. At this point there was no danger that any of the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime . . . . We think that the search was too remote in time or place to have been made as incidental to the arrest and conclude, therefore, that the search of the car without a warrant failed to meet the test of reasonableness under the Fourth Amendment, rendering the evidence obtained as a result of the search inadmissible."

(Fn. continued.)

is required unless some grave emergency can be shown that necessitates an immediate search without a warrant. [Ciatation.] Further, 'a warrantless search must be "strictly circumscribed by the exigencies which justify its initiation."' [Citation.] When those circumstances cease to exist, the exception also ceases to exist and a warrant must be obtained. This is the rationale of Chadwick: 'Even though on this record the issuance of a warrant by a judicial officer was reasonably predictable, a line must be drawn. In our view, when no exigency is shown to support

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In Chambers v. Maroney (1970) 399 U.S. 42, 47 [90 S.Ct. 1975, 1979], which also involved the search of a car, the court cited Preston and stated:

"Even so, the search that produced the incriminating evidence was made at the police station some time after the arrest and cannot be justified as a search incident to an arrest: 'Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest.' [Citation.] Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 [88 S.Ct. 1472] . . . , is to the same effect; the reasons that have been thought sufficient to justify warrantless searches carried out in connection with an arrest no longer obtain when the accused is safely in custody at the station house."

> the need for an immediate search, the Warrant Clause places a line at the point where the property to be searched comes under the exclusive dominion of the police authority.' [Citation, italics added.] To hold otherwise would exult the exceptions above the rule." (Fn. omitted, see also People v. Pace (1979) 92 Cal. App.3d 199, 203-204.)

From the above, we conclude Belton permits the police to search the containers found in the passenger compartment of an automobile incident to the arrest of the occupants only when the search is contemporaneous with the arrest and when the container to be searched is not in exclusive police control. Only in this context do exigent circumstances exist that justify the right to engage in a warrantless search. Such a rule accords with principles of Chimel v. California, supra, 395 U.S. 752.

We decline the Attorney General's invitation to expand Belton to permit a search of the containers five hours after their

seizure. A strong public policy requires police officers to search containers at the time they are seized from the automobile if physically possible. The present case is a good illustration. Appellant and his friend were arrested and booked into the Contra Costa jail on the basis of the contraband which the officers assumed to be in the packages. Although not likely under the particular facts of this case, it was entirely possible that the packages did not contain contraband since they were inside the Fortner home for over one-half hour without any police contact before being placed in the Volkswagen. It was only when the packages were opened that the officers could verify absolutely their belief as to the contents of the packages which was based on multiple (quadruple) hearsay going back to the New York customs search several weeks

/

earlier.[3/]

Having decided Belton does not validate the warrantless search of the packages in the instant case, we reiterate with a few additional comments the opinion rendered by our late colleague Justice George Hopper published in 111 Cal.App.3d 580. (See People v. Kriuda (1971) 5 Cal.3d 357, reiterated in 8 Cal.3d 623 (1973).).

We reject for two reasons the argument that appellant had no reasonable expectation of privacy in the packages because the packages had been subject to an earlier customs search. First, as explained by the United States Supreme Court in Walter v. United States ____ U.S. ____ [100 S.Ct. 2395, 2402,

3/ We assume the officers' probable cause for the arrest of the Volkswagen's occupants arose solely from their possession of the packages. If the packages had not contained contraband, then appellant and his companion should not have been arrested. A contemporaneous search of the packages at the time they were seized would prevent such an occurrence.

fn. 12 (lead opn.)]: ". . . it is difficult to understand how petitioners' subjective expectation of privacy could have been altered in any way by subsequent events of which they were obviously unaware." Second, even assuming appellant had a lesser expectation of privacy in the packages because they were opened in New York, the diminution of privacy ended when the packages were delivered by the police to the Merced address. The police fully understood this as evidenced by the fact they obtained a search warrant for the packages at the Merced address.

Once the packages were delivered to the Fortner residence, they were no longer under the dominion of the government. (People v. Whyte (1979) 90 Cal.App.3d 235, 243.) As noted in Whyte in every California "controlled delivery" case "a judicially authorized warrant was obtained because the agents

realized they were not carrying out a customs search. [Citations.]"

Nor can we accept the argument the search warrant for the Fortner residence somehow obviated the need for an additional warrant to open the packages after they were seized from the appellant's auto. As we have noted, the warrant was restricted to the residence and any packages located therein. Once appellant took the packages from the Fortner residence and placed them in the backseat of his automobile, the packages were no longer subject to the warrant.

The key to this case is appellant's expectation of privacy in the packages as they rested on the backseat of his automobile. The packages were sealed and wrapped tightly. Nothing in their appearance indicated their contents. Appellant had no knowledge of the prior customs search or that a warrant had been issued to seize the packages at the

Merced address. Thus, appellant manifested a reasonable expectation of privacy in the packages as a matter of law.[4/]

Finally, we cannot accept respondent's argument that the police could search the seized packages without a warrant because

4/ Justice Powell in his concurring opinion in Robbins v. California (1981) 101 S.Ct. 2841, 2850, footnote 3, decided the same day as Belton, points out that "When confronted with the claim that police should have obtained a warrant before searching an ambiguous container, a court should conduct a hearing to determine whether the defendant had manifested a reasonable expectation of privacy in the contents of the container. [Citation.] Relevant to such an inquiry should be the size, shape, material, and condition of the exterior, the context within which it is discovered, and whether the possessor had taken some significant precaution, such as locking, securing sealing or binding the container, that indicates a desire to prevent the contents from being displayed upon simple mischance. . . .

"In this case, petitioner, by securely wrapping and sealing his package, had manifested a desire that the public not casually observe the contents. [Citation.] Our society's traditional respect for the privacy of locked or sealed containers confirms the reasonableness of this expectation. (See Ex parte Jackson, 96 U.S. (6 Otto) 727, 733, 24 L. Ed. 877 (1878) (warrant required for postal inspectors to open sealed packages sent through mail).) [Citation.]"

"their contents could be inferred from their outward appearance." (Arkansas v. Sanders, supra, 442 U.S. 753 [99 S.Ct. at p. 2593, fn. 13].)[5/] Nothing in the appearance of the packages in question would indicate they contained contraband.

We acknowledge our decision may seem inexplicable at first glance. The officers believed that hashish of substantial value was in appellant's possession because of the prior customs search. The officers had obtained a search warrant to seize the pack-

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5/ The footnote reads:

"Not all containers in packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because of their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to 'plain view' thereby obviating the need for a warrant. [Citation.] There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not." (Emphasis added.)

ages at the Fortner residence. Nonetheless, the contraband must be suppressed because the officers failed to execute the warrant at the residence and failed to obtain another warrant to open the packages after they were seized from appellant's automobile. Having the right under Belton to open the packages when appellant was arrested, the question naturally arises: why should the officers be required to get another warrant to open the packages at their later convenience? The answer, of course, is that the Constitution, as interpreted by the high courts of our land, mandates a warrant be obtained unless there are exigent circumstances. Probable cause, although it may be overwhelming, is not enough; it is a neutral magistrate and not the police that determines if private packages may be searched.

Officers are required to play by the rules. They knew the search warrant was restricted to the Merced address. Once they

failed to spring their trap by executing the warrant at the residence, thereby permitting their quarry and the packages to leave that location, the rules changed. Appellant's reasonable expectation of privacy in the packages became paramount, and any subsequent seizure of the packages was subject to the severe constraints placed on warrantless searches. Absent exigent circumstances, a warrant must be obtained to search the containers when placed under the exclusive control of an officer. (United States v. Chadwick, supra, 433 U.S. 1; Arkansas v. Sanders, supra, 442 U.S. 753; People v. Minjares (1979) 24 Cal.3d 410, 423; People v. Dalton (1979) 24 Cal.3d 850, 856.)

Because New York v. Belton, supra, 101 S.Ct. 2860, is inapplicable to the facts of this case, we need not address appellant's alternate contention that the search was invalid under article I, section 13 of the

California Constitution.

The judgment is reversed.

FRANSON, Acting P.J.

I CONCUR:

STONE, C., J.*

*Assigned by the Chairperson of the Judicial Council.

THE PEOPLE v. ROBERT LAWRENCE RIEGLER

5 Crim. No. 4230

DISSENTING OPINION BY ANDREEN, J.

I respectfully dissent.

When Belton[1/] is read in the context of the instant case, one is compelled to the dreary conclusion that the high court either paid no attention to the facts of the latter or has used this remand as an opaque precursor of fundamental change.[2/]

In an attempt to understand the remand, it may be desirable to review the reasoning behind the special rules involving automobile searches. One of the two reasons for the distinction between search of automobiles and other private property is that the configuration, use and regula-

1/ New York v. Belton (1981) ____ U.S. ____ [101 S.Ct. 2860].

2/ Change may well be indicated for this area. But clarification, not obfuscation, is needed for the lower courts.

tion of automobiles dilutes the reasonable expectation of privacy that normally exists in reference to other species of property. (See Arkansas v. Sanders (1979) 442 U.S. 753, ____ [99 S.Ct. 2586, 2591].)

What was the expectation of privacy in the two packages in the instant case? The material was sent through international mails; the markings on the packages announced that fact. It went through customs, and thus was subject to search. I cannot follow the argument of the majority that appellant had a greater expectation of privacy in the packages than the addressee.[3/] He was involved in a shipment of two packages from Germany to the ultimate destination of the

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3/ Contrary to the majority's assertion, the fact that the police secured a search warrant for the Merced residence does not evince a law enforcement opinion that a privacy interest sprang into existence upon delivery to the house. It simply manifests an understanding by competent officers that in order to get into the house they would need a search warrant.

Volkswagen. As such, he benefited from that aspect of the transportation which moved the packages through JFK airport. A person engaged in such an enterprise accepts the burdens as well as the benefits of the transaction. (See, generally, Almeida-Sanchez v. United States (1973) 413 U.S. 266, 271-272, which used similar language in describing businesses subject to administrative inspection.)

There can be no doubt that the packages in the back seat of the Volkswagen were the same as went through customs search. The majority argues that it was possible that the contents of the packages were not hashish because they had been iside the Fortner home for "over one-half hour without any police contact." But the search warrant was for packages addressed to Michael and Selma Fortner with a certain return address. The return on the search warrant itemizes two packages addressed to Selma Fortner, without

mention of the return address. However, during testimony at the preliminary hearing, Lieutenant Moore testified that he had seen the two packages earlier. This could only refer to the perior of time before they were given to the mail carrier for delivery to the house. There was no possibility of substitution of packages or contents.

These packages advertised the fact that they had been sent through international mails. I would argue that there was no legitimate expectation of privacy in them. This, coupled with the concept in Belton that once a custodial arrest is made there is a justifiable infringement in any privacy interest that the arrestee may have, makes a claim of a privacy interest ludicruous. The expectation of privacy is at the heart of the application of the Fourth Amendment. (Smith v. Maryland (1979) 442 U.S. 735.)

As an alternative reason for affirm-

ing the trial court, it appears to me that there was really no search at the police station. The search had taken place at JFK airport. At all times afterward the hashish was in plain view. What occurred at the police station was simply an inventory of known property.

Yet another reason justifying affirmance is the concept of constructive possession discussed in my concurring opinion filed the first time we considered this case. (People v. Riegler (1980) 111 Cal. App.3d 580, 589-590.)

I would affirm the judgment of the trial court.

ANDREEN, J.

CERTIFIED FOR PUBLICATION

IN THE

COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE

FIFTH APPELLATE DISTRICT

COURT OF APPEAL
FIFTH APPELLATE DISTRICT
F I L E D
JAN 21 1982
KEVIN A. SWANSON, Clerk
By _____ Deputy

THE PEOPLE, Plaintiff and Respondent, v. ROBERT LAWRENCE RIEGLER, Defendant and Appellant.	5 Crim. No.4230 (Super. Ct. No. 9648) Denial of Petition for Rehearing

The petition for rehearing is denied.

FRANSON, Acting P.J.

I CONCUR:

STONE, P.J.*

I would grant the rehearing.

ANDREEN, J.

*Assigned by the Chairperson of the Judicial Council.

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL
5th District, Division ____, Crim. No. 4230

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
MAR 17 1982
LAURENCE P. GILL, Clerk
Rheu Deputy

PEOPLE

v.

ROBERT LAWRENCE RIEGLER

Respondent's petition for hearing DENIED.

Richardson, J., and Kaus, J., are of the opinion that the petition should be granted.

BIRD, Chief Justice

I. LAURENCE P. GILL,
Clerk of the Supreme Court of the
State of California, do hereby certify
that the preceding is a true copy of an
order of this Court, as shown by the
records of my office.
Witness my hand and the seal of the
Court this ___day of MAR 19 1982 A.D. 19__
Clerk
By J ROSSI, Deputy Clerk

IN THE

COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE

FIFTH APPELLATE DISTRICT

COURT OF APPEAL
FIFTH APPELLATE DISTRICT
F I L E D
MAR 19 1982
KEVIN A. SWANSON, Clerk
By _____
Deputy

People of the State of California,
Plaintiff and Respondent,
vs.

Robert Lawrence Riegler,
Defendant and Appellant

BY THE COURT:

The issuance of the remittitur in the above-entitled action is ordered stayed, pending further order of this court.

Dated MAR 19 1982

BROWN (GEO. A.) P.J.

Opposition

Office-Supreme Court, U.S.
FILED
MAY 18 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-1916

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ROBERT LAWRENCE RIEGLER,

Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT

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NO. 81-1916

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ROBERT LAWRENCE RIEGLER,

Respondent.

RESPONSE IN OPPOSITION

TO

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE WARREN BURGER, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent ROBERT LAWRENCE RIEGLER, through his attorney, respectfully requests that this Court deny the Petition for Writ of Certiorari requested by the People of the State of California after the decision by the Court of Appeal, Fifth Appellate District, reversing the conviction of Respondent and the order denying the motion to suppress evidence.

STATEMENT OF THE CASE

AND

STATEMENT OF FACTS

Respondent hereby incorporates the Statement of the Case contained in the Petition for Writ and incorporates by reference the summary of the record of the case as described in the Opinions of the California Court of Appeal (Petition, Appendix A, pages 2-7;and Exhibit A, Prior Opinion of California

Court of Appeal, attached hereto.)

STATUTORY PROVISIONS INVOLVED

Constitution of the State of California, Article I, Section 13:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

Penal Code of the State of California, Section 1525:

> A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the persons and particularly describing the property and the place to be searched [emphasis added].

ARGUMENT

I. THE BELTON RULE DOES NOT PROVIDE A JUSTIFICATION FOR THE WARRANTLESS SEARCH OF THE PARCELS.

The California Court of Appeal's requirement of contemporaneity in order to invoke the Belton rule comports not only with a literal reading of Belton, but also with that case's underlying rationale. New York v. Belton (1981) ____U.S.____, 69 L.Ed.2d 768, 101 S.Ct. 2860. Furthermore, the creation of a new exception to the warrant requirement, as Petitioner urges, based on the facts of this case, would effectively demand a reversal of United States v. Chadwick, 433 U.S. 1 (1977).

This Court held in Belton that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile...[and] the contents of any containers found within the passenger compartment..." Belton, 101 S.Ct. at 2864. In that case, a lone police officer had stopped the Defendant's car for speeding, ordered him and three other passengers out of the car on a rural road late at night and, after smelling burning marijuana and seeing an envelope on the floor of the car marked "Supergold", made a quick check of the interior of the car. He found Defendant's jacket, unzipped a pocket, and discovered cocaine therein. This Court upheld the search and seizure of the cocaine, as coming within the rule of

Chimel v. California, 395 U.S. 752, 23 L.Ed.2d 685, 89 S.Ct. 2034 (1969). The Chimel rule is that a warrantless search and seizure is justified by the exigent circumstances: the need to remove any weapon on the immediate vicinity which could be used against the arresting officer, and the need to prevent the concealment or destruction of evidence. Belton, 101 S.Ct. at 2862: Chimel, 395 U.S. at 763.

Upon reading Petitioner's Brief, one might get the impression that Belton created a further exception to the warrant requirement. It is crucial to recognize, however, that Belton simply discussed the applicability of Chimel to custodial arrests of automobile occupants.

> Our holding today does no more than determine the meaning of Chimel's principles in this particular and problematic content. It in no way alters the fundamental principles established in the Chimel case regarding the basic scope of searches to lawful custodial arrests. (Belton, 101 S.Ct. at 2864, fn. 3)

Petitioner's reasoning -- that a contemporaneous search of the packages was not necessary in this case because the officers were already virtually certain of what the packages contained -- ignores the basic tenets of the law surrounding warrantless searches. "Searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well delineated exceptions." These exceptions are to be "jealously and carefully drawn" and there must be "a showing by those who seek exemption...that the exigencies of the situation made that course imperative." Coolidge v. New Hampshire, 403 U.S. 443, 454-5 (1971) (emphasis added); Belton, 101 S.Ct. at 2862.

The "search-incident-to-an-arrest" exception to the warrant requirement has been "jealously and carefully drawn" to include only contemporaneous searches, since the exigency justi-

fying a warrantless invasion into a person's property (the potential for a hidden weapon close by, or the destruction of evidence, Chimel, 395 U.S. at 763) vanishes when the arrestee is removed from the scene of his arrest. As noted above, Belton specifically reaffirmed this reasoning. Belton, 101 S.Ct. at 2862.

It is not surprising, therefore, that cases construing Chimel and Belton have unanimously required a contemporaneous search or seizure to justify the warrantless invasion of privacy. In United States v. Calandrella, 605 F.2d 236 (6th Cir., 1979), agents seized Defendant's briefcase at the time of his arrest, transported it to the F.B.I. office, and searched it there without a warrant. The Court held that Chimel did not apply to the later search of the briefcase:

> [O]nce the agents had seized the item and reduced it to their exclusive control, there was no further danger that the defendant would secure therefrom either a weapon or an instrumentality of escape, or would destroy evidence contained in the briefcase...Thus, the interests sought to be protected by permitting warrantless searches incident to an arrest were fully vindicated by the seizure of the briefcase at the time of the arrest. (Calandrella, 605 F.2d at 249)

Likewise, in United States v. Cleary, 656 F.2d 1302 (9th Cir. 1981), a police officer stopped a van on the highway for a broken mirror. Upon smelling marijuana, he arrested the driver. The police officer searched the passenger area of the van, found and seized a canvas bag, and took it to the police station where he searched it without a warrant. The Court rejected the argument that Belton justified the later search of the canvas bag:

> Belton involved the permissible scope of a contemporaneous search at the scene of, and incident to, a lawful arrest. The Belton court emphasized the contemporaneous nature of the search...This case...involves a search removed from the arrest both geographically and temporally, and hence cannot be justified on that basis. (Cleary, 656 F.2d at 1305, fn. 9)

See also, United States v. Musick, No. CR-80-0328 RFP (N.D. Cal., Jan. 21, 1982), distinguishing Belton. ("[T]he search [of defendant's briefcase] was not contemporaneous with the custodial arrest, and therefore not "incident to a lawful arrest" and therefore not valid without a warrant under the reasoning of Preston, Chadwick, and a host of circuit decisions.").

Clearly, Petitioner relegates to a "truism" (Petitioner's Brief, p.13) what really lies at the very heart of Chimel and Belton. Without contemporaneity, the exception cannot stand.

In the instant case, the search of the mailed parcels was plainly not contemporaneous or incident to arrest. Just as clear, the parcels were securely in the immediate and exclusive control of the police when opened. The record is uncontradicted that the search of the parcels occurred four to five hours after examination and seizure of the Volkswagen, 100 miles from the scene of arrest and the jailed suspects, in the security of police headquarters, and with no fear or concern for the stability or danger of the contents of the packages.

Petitioner's argument that the police officers' virtual certainty of what the packages contained justified the later warrantless search within the secure confines of a police station ignores another fundamental principle of search and seizure law. If there is no exigency, the initial determination of probable cause -- no matter how compelling or persuasive the circumstances -- is to be made by a neutral magistrate, not by police officers. As the California Court of Appeal stated in this case:

> [T]he Constitution, as interpreted by the high courts of our land, mandates a warrant be obtained unless there are exigent circumstances. Probable cause, although it may be overwhelming, is not enough; it is a neutral magistrate and not the police that determines if private packages may be searched. See Opinion, Exhibit A, Petition.

Because the police failed to make a contemporaneous search, but rather had exclusive control of the packages and were faced with no exigent circumstances when they made the warrantless search, the case falls squarely within the ambit of Chadwick. That case held that once personal property is seized from a vehicle and is safely in police custody, a search warrant must be obtained before the personal property can be opened and searched, even if there is independent probable cause to believe that the seized item contained contraband.

The majority in Belton distinguished Chadwick on the basis of contemporaneity:

> As the Court pointed out in the Chadwick case, "Here the search was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody; the search therefore cannot be viewed as incidental to the arrest or as justified by any other exigency." 433 U.S. at 15; Belton, 101 S.Ct. 2865.

In the instant case, as in Chadwick, the seized property was "under the exclusive dominion of police authority" when searched, Chadwick, 433 U.S. at 15. There was no exigency demanding an immediate search. The Fourth Amendment in this circumstance requires that police officers obtain a warrant before searching the seized packages.

II. THE FACT THAT DEFENDANT RECEIVED THE PACKAGES BY MEANS OF A "CONTROLLED DELIVERY" DID NOT AUTHORIZE THE GOVERNMENT TO CONDUCT A WARRANTLESS SEARCH OF THE PACKAGES.

A. In California, At Least, A Search After Controlled Delivery May Not Be Justified As Any Kind of Extension of Customs' Powers.

Under California law, a search warrant is required in the "controlled delivery" setting. People v. Whyte, 90 CA3 235, 152 C.R. 280 (1978), cert. den. 444 U.S. 1093 (1980). In that case, mail parcels addressed to Defendant were discovered by a

U.S. Customs agent to contain hashish. Agents conducted a controlled delivery of the parcels to Defendant's place of business. After waiting in vain for about twelve hours for Defendant to pick them up, the agents took the parcels into custody without a warrant. The government argued that no warrant is necessary to seize property that has been subject to a controlled delivery, since it is an extension of the powers bestowed on U.S. Customs officials. The California Court of Appeal flatly rejected this argument, holding that once mailed property was delivered to its addressee, "a warrantless search and subsequent seizure of the [mailed property] became unreasonable under any theory." The Court held that in no way could this be construed as a customs search:

> It is unreasonable to characterize this search and seizure as a customs search when the bales had been searched by customs four days earlier at San Francisco International Airport and the seizure was carried out by DEA and police agents at a bookstore after the goods were in the possession of federal agents for the entire four-day period prior to the "controlled delivery." Whyte, 90 CA3 at 243.

Contrary to Petitioner's assertion that the "apparent rationale" of Whyte is that "the police may not use a controlled delivery as a pretext for the warrantless invasion of the homes or businesses of third persons" (Petitioner's Brief, p.24), Whyte squarely held that, under California law, any search and seizure after delivery must be subject to a warrant or justified by exigent circumstances. In the instant case, the packages were delivered to Defendant's address two weeks after entering the country. The so-called "controlled delivery" here involved loss of visual contact and control over the movement of the packages for well over three hours and a distance of over one hundred miles. In fact, the investigating officers "lost" the packages in the Merced residence and did not know if one or both of the parcels had been moved from the residence to the vehicle

which transported them across the State of California.

It is clear the California law controls this case. The search and seizure was conducted by state agents after federal agents and customs authorities had relinquished control over the alleged contraband. The California standard must be applied where state agents are involved, even if that standard is stricter than the federal rule. Cooper v. California, 386 U.S. 58, 62 (1967).[1]

The argument that the package was still in constructive possession of federal, or even state, agents must fail on another ground as well. The Respondent is charged with possession of marijuana for sale. The government may not claim that it had

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[1] Therefore, Petitioner's heavy reliance on United States v. Richards, 638 F.2d 765 (5th Cir. 1981) (Petitioner's Brief, p. 20-21 and other Federal "controlled delivery" cases (Petitioner's Brief, p. 19-20) is misplaced. However, even assuming federal law did apply, it is debatable whether there is a federal rule that would obliterate the warrant requirement in this case. Of those cases cited by Petitioner, it is notable that there was always a constant visual contact or actual control over contraband in transit. See, e.g., United States v. Bulgier, 618 F.2d 472 (7th Cir. 1980). Furthermore, the facts in Richards present a very different picture than the one in the instant case. There, the government delivered a package known to contain heroin to Defendant's post office box. Defendant took the package outside the post office, and into the parking lot. The agents "exercised care to assure that he had no opportunity to leave the scene with the parcel." Richards, 638 F.2d at 768. The Court deemed this fact significant; it stated that its holding:

> does not sanction searching mail that has been delivered to the addressee and taken into his private possession beyond the scrutiny of government officials, with the concomitant possibility that the contents of the package had been altered. (Id, at 773, fn. 7)

In the instant case, by comparison, agents: 1) allowed the packages to be "taken into [Defendant's] private possession beyond [their] scrutiny" during the 35 minutes the packages were inside Defendant's house; and 2) allowed Defendant to drive for 3 hours and 100 miles away from the scene of delivery. It is at best unlikely that the Richards court would reach the same result in this case.

Nor does Petitioner's reliance on the "border search" cases obviate the need for a warrant. It simply cannot be maintained that a package which goes through Customs in New York City is subject to a "border search" on the California coast weeks later. See, United States v. Almeida-Sanchez, 413 U.S. 266 (1973).

sufficient dominion over the marijuana to obviate Respondent's Fourth Amendment or California Constitutional rights while at the same time it is prosecuting him for a crime in which possession of the seized evidence is itself an essential element. "Proper administration of criminal justice should not include such contradictory assertions of governmental power." United States v. Kelly, 529 F.2d 1365, 1370-71 (8th Cir. 1976).

B. Respondent's Expectation of Privacy In The Packages Was Not Diminished By The Prior Customs Search.

Once it is determined that the search of the packages was not "incident to arrest" nor an extended customs search, then in order to justify the warrantless search the government must show that Respondent had no privacy interest in them. As the California Court of Appeal recognized, "The key to this case is [Respondent's] expectation of privacy in the packages as they rested on the backseat of his automobile." 127 CA3 at ____.

There is neither authority nor logical basis by which to support Petitioner's argument that a prior search of an object, unknown to the recipient, deprives him of a reasonable expectation of privacy in it thereafter. Walter v. United States, ____U.S. ____; 100 S.Ct. 2395, 2402 fn. 12, (1980), (lead opinion). Compare United States v. Andrews, 618 F.2d 646, 652 (1980) where the recipient had been advised by a federal agent that the contents of the package were known to authorities before the recipient accepted delivery of the package.

The case at bar does indeed differ factually from Walter, supra, but Walter does not stand for the above proposition that Petitioner claims. As asserted by the California Court of Appeal in its original opinion of this case, 111 CA3d at 585-86, an important element in the inquiry with respect to reasonable expectation of privacy is the foreseeability of a claim of privacy.

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The case at bar does indeed differ factually from Walter, supra, but Walter does not stand for the above proposition that Petitioner claims. As asserted by the California Court of Appeal in its original opinion of this case, 111 CA3d at 585-86, an important element in the inquiry with respect to reasonable expectation of privacy is the foreseeability of a claim of privacy.

That is, whether a person has a privacy interest in something depends on that person's subjective expectation, not on circumstances beyond the person's knowledge. As stated by the Walter court:

> The fact that the cartons were unexpectedly opened by a third party before the shipment was delivered to its intended consignee does not alter the consignor's legitimate expectation of privacy. (Walter, 100 S.Ct. at 2402-3)

In the instant case, the packages were re-wrapped after the Customs search to look just as they did before the search, in an effort not to alert the suspects that a search had been performed. In effect, the government was trying to foster an expectation of privacy. Thus, the government cannot now claim that a claim of expected privacy was not foreseeable. See United States v. Rivera, 486 F.Supp. 1025, 1034 (N.D. Tex. 1980).[2]

The recipient had no way of knowing that the outward appearance of the package somehow inferred its contents. The package was wrapped in a thoroughly inconspicuous manner. The "plain view" exception of Arkansas v. Sanders, 442 U.S. 753, 764-65 fn. 13 (1979) therefore does not apply to diminish a reasonable expectation of privacy.

III. THE SEARCH WARRANT DID NOT AUTHORIZE THE SEIZURE OR OPENING OF THE PACKAGES.

As indicated in the opinion of the California Court of Appeal, the warrant authorized a search of the "premises at 1130 W Street" for various items within the house.

Under Section 1525 of the Penal Code of California and Article I, Section 13 of the State Constitution:

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[2] Petitioner seeks to distinguish Walter further by asserting that the holding in that case depended on "First Amendment considerations" (Petitioner's Brief, p.22). Even a cursory reading of Walter reveals that the case rests firmly on a Defendant's reasonable expectation of privacy, not on his right to protected speech.

> A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the persons and particularly describing the property and the place to be searched [emphasis added].

The particularity requirement has been interpreted strictly by California courts: "...the constitutional requirement that a warrant particularly describe the place to be searched compels the conclusion that the privilege to search created by a warrant does not extend beyond the place or places described therein." People v. Dumas, 9 Cal.3d 871, 880 (1973). In Dumas, officers had a warrant to search for stolen documents in a particular house. They executed the warrant in the house and found no documents, but did find them in a car parked in front of the house. The Supreme Court of California specifically held that the search and seizure of the documents was not authorized by the search warrant, Id, at 880-81, although other, exigent circumstances allowed for a warrantless search of the car.

Petitioners urge that this Court adopt an exception in controlled delivery situations to the rule that a warrant describe with particularity the place to be searched (Petitioner's Brief, p.29). Such an exception is justified, Petitioner argues, because of the inherent moveability of contraband sent through the mails. This argument is specious. Contraband sent through the mails is no more "moveable" than other like contraband that is at the disposal of its possessor. The controlled delivery setting does not create any greater risk of moveability of contraband. In fact, the presence of law enforcement agents at controlled deliveries makes moveability far less likely. Here, the officers intentionally allowed the contraband to move, hoping to find other confederates in crime.

Petitioner would like to see a rule adopted whereby any time the object being sought by law enforcement officers is capable of being easily moved, government agents should have a

"carte blanche" warrant to search any place they suspect the object has been moved to. Not only would such an exception create potential for governmental abuse, but, more importantly, it would directly contravene the dictate of the Fourth Amendment that a warrant "particularly describe the place to be searched."

It is not surprising, therefore, that Petitioner cites no relevant authority for this astounding proposed exception. United States v. Napoli, 530 F.2d 1193 (5th Cir. 1976), the single case relied on by Petitioner in support of the proposed exception, stands only for the proposition that a warrant to search the "premises" of a certain address includes a camper parked in the driveway "almost touching the building", Id, at 1201.

Respondent contends that it is not absurd to conclude that the search warrant here did not justify a search and seizure that began over one hundred miles from the place described to be searched by the warrant. Nor does Respondent contend that a separate warrant be obtained for each item that would have been seized from the residence where the warrant authorized a search. Such a conclusion does not follow from the judgment of the Court below. It simply restricts that authority of the warrant to the place specifically described in it.

Likewise, the legitimacy of the seizure of the package does not authorize its opening and search without a warrant. United States v. Chadwick, 433 U.S. 1 (1977). Nothing is disclosed in the record that would have prevented the seizing agents here from obtaining a warrant in the normal course of business. To argue that obtaining a warrant would cause additional burdens to the legal system simply begs the question as to the need for the warrant requirement. It would appear that such questions have long since been put to rest. Id.

IV. A "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE WOULD REWARD IGNORANCE OF THE LAW.

Petitioner complains that suppression in this case will

lead to overwhelming confusion for the police officer in the field. As pointed out in the Opinion of the California Court of Appeal (Petition, Appendix A, page 11), there is a simple rule that has been enunciated that removes all confusion. Rivera, supra, 486 F.Supp. at 1034.

The exclusionary rule has evolved to encourage police practice in conformity with the law. To permit "good faith" oversights and/or ignorance of the law to be an exception to the exclusionary rule would simply create an incentive to keep police blissfully ignorant of the law.

Moreover, it would create an entire new field of inquiry in the area of search and seizure. In many cases the issue of the subjective knowledge and the good or bad faith of a police officer will have to be litigated. Ascertaining the subjective intent and the moral quality of an officer's action is well nigh impossible in any event.

But, aside from the policy defects in Petitioner's argument for a good faith exception to the exclusionary rule, there is also the question of whether what occurred there was a "good faith mistake" or just sloppiness. This Court must distinguish between an error or mistake of perception or fact in good faith as opposed to failure to employ legally required procedure. Thus, fine distinctions in facts supporting probable cause and minsterial defects in the issuance of a warrant are rarely invoked against the validity of a search. But the complete failure to obtain legal justification to search must be sanctioned no matter how great the probable cause for it. United States v. Chadwick, supra.

Merely because some search warrant was obtained which would have led to the legal search of the contraband here does not absolve law enforcement agents from all further legal process under the Fourth Amendment. Because, in part, of the actions of

the agents here, the warrant did not result in the seizure of the contraband. To permit the subsequent search to be upheld merely because a warrant was obtained at some earlier point in the investigation of the case is not a good faith error, but just muddled thinking, approval of which will lead to the possibility of substantial abuse.

CONCLUSION

The California Court of Appeal correctly decided that the warrantless search of the mailed parcel was improper under California law.

A warrant was required because it is required in any event according to California law in the "controlled delivery" setting and because the mailed parcel here had actually been delivered and was no longer in control of the delivering officers.

The warrant issued for the search of the residence cannot be the source of authority to search an object searched and seized away from the residence.

Petitioner's basic thrust is that the facts of this case justify overlooking the applicable rules of law, or that certain new exceptions to the rules should be made to justify the search. Respondent submits that orderly process requires application of law to the facts and not the fashioning of new rules of law to meet each factual setting that may arise.

The contention that the decision of the California Court of Appeal places "an impossible burden" on law enforcement is hyperbolic. All the officers here needed to do was prepare a few forms and attach a police report for the issuance of a warrant to open the packages.

Respondent respectfully submits that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

Eugene S. Seltzer

EUGENE S. SELTZER
DUANE, LYMAN & SELTZER

COURT OF APPEAL
FIFTH APPELLATE DISTRICT
FILED
OCT 30 1980
KEVIN A. SWANSON, Clerk
By _____ Deputy

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ROBERT LAWRENCE RIEGLER, Defendant and Appellant.	5 Crim. No. 4230 (Super. Ct. No. 9648 O P I N I O N

APPEAL from a judgment of the Superior Court of Merced County. Donald R. Fretz, Judge. Reversed.

Eugene Seltzer, Attorney for Appellant..

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General, Arnold O. Overoye, Assistant Attorney General, Roger E. Venturi and Ramon M. de la Guardia, Deputy Attorneys General, for Plaintiff and Respondent.

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SEE CONCURRING OPINION

EXHIBIT A

PRIOR OPINION OF COURT OF APPEAL
Filed October 30, 1981

In this case we consider the applicability of the container decisions to wrapped and sealed packages arriving by overseas mail which are opened by customs officials, resealed, delivered in a controlled delivery with a search warrant for the residence of the addressee, seized in a vehicle approximately 100 miles from that residence, returned to the city of the addressee, and subsequently opened by law enforcement officers without first obtaining a search warrant to open the packages. We conclude that while the seizure was proper, the warrantless search was not.

In the instant case Riegler pled guilty to a charge of possession of marijuana for sale after his motion to suppress was denied. He appeals asserting error in denial of the suppression motion.

The facts are these:

On November 8, 1977, a customs inspector at JFK Airport in New York City notified John Huber, a special agent with the Drug Enforcement Administration, that a detector dog had alerted the inspector to two packages sent from Germany and when the inspector opened them up he observed what he believed to be hashish.

Chemical analysis confirmed that the substance was hashish.

The packages were addressed to Selma and Mike Fortner, 1130 W Street, Merced, California.

The packages were resealed by the customs agent and Huber sent the packages to Patrick Dorn, a United States postal inspector in Fresno who received them on November 21, 1977.

Dorn brought the packages to Merced and contacted a Lieutenant Moore who was in charge of specialized manpower assigned to crime control (SMACC) in Merced County. Huber also had contacted Moore on November 21, 1977, and told him about the packages.

The plan was to have a controlled delivery and Agent Atkins with SMACC obtained a search warrant on November 22, 1977, for the premises at 1130 W Street.

On November 22nd, Lieutenant Moore and other agents took up surveillance at the Fortner residence. At approximately 1:30 Dorn gave the parcels to the regular mail carrier who delivered the parcels at approximately 1:40 and Michael Fortner took them.

About ten to fifteen minutes after the delivery of the packages a red Volkswagen pulled into the driveway at the Fortner residence.

Lieutenant Moore testified that between 1:40 and 2:11, when Riegler drove the Volkswagen away with the packages, nothing prevented Moore from going into the residence to execute the warrant. He did not immediately serve the warrant because he wanted to wait for the occupants to have time to open the package. He was also interested in where the hashish was going if it left the residence. He wanted to ascertain who else was involved in the case and whether he could arrest more people. He would follow suspects wherever they went, including on a plane.

Before the vehicle left, the packages were placed in the Volkswagen but a SMACC agent could not tell if both packages were put in.

After the Volkswagen left, the warrant was executed and served on Mike Fortner at 2:30, and the house searched, but nothing incriminating was found. Agent Austin overheard Michael Fortner on the phone say that a couple of packages came for Bob and "I gave them both to Bob."

The search warrant was apparently restricted to the premises, structures, rooms and receptacles of the Fortner residence at 1130 W Street, Merced, and did not provide for the search of any vehicle or persons.

When the vehicle left the Fortner residence SMACC agents including Moore, along with postal inspector Dorn, followed. Although several opportunities existed to detain the occupants, the officers chose not to do so until approximately 4:05 p.m., at which time the vehicle was stopped in Contra Costa County approximately 100 miles from the Fortner residence. The reason for the stop then was the fear of losing surveillance in East Bay traffic.

Riegler and a codefendant (Bannister) exited the vehicle and were arrested. Moore observed two packages in the back seat of the Volkswagen. The packages were identified as being the same ones previously seized, opened, rewrapped and delivered. The packages did not appear to have been opened after delivery to the Fortner residence. The seized packages were taken to the SMACC office in Merced where they were photographed and opened and found to contain hashish valued at approximately $100,000. No search warrant was obtained before the opening. Moore testified that when he took the packages back to the Merced office, he had no fear that something would happen to the packages.

Relying on United States v. Chadwick (1977) 433 U.S. 1, People v. Minjares (1979) 24 Cal.3d 410, and their progeny of container cases, Riegler asserts that a search warrant for the packages should have been obtained before the packages were opened in Merced. We agree.

We reject the contention that Riegler had a lesser expectation of privacy in the packages on the theory that the packages were initially subject to customs search. The packages were securely wrapped and sealed with no labels or markings to indicate the character of their contents. As the United States Supreme Court said in Walter v. United States (___ U.S. _____, 100 S.Ct. 2395, 2402, footnote 12 (lead opinion): 1/:

> ". . . it is difficult to understand how petitioner's subjective expectation of privacy could have been altered in any way by the subsequent events of which they were obviously unaware."

At the very least in this case there was an expectation that when the packages arrived at the Merced address the contents

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1/ Walter was a 5-4 opinion. In Walter there had been an interstate shipment of several secured sealed packages containing eight-millimeter films apparently depicting homosexual activities. This shipment was mistakenly delivered by a private carrier to a third party rather than the consignee. Employees of the third party opened each of the packages. Inside were individual film boxes on one side of which were suggestive drawings and on the other explicit descriptions of the contents. The Federal Bureau of Investigation was notified and picked up the packages. The films were viewed with a projector without first obtaining a warrant. Mr. Justice Stevens joined by Mr. Justice Stewart concluded that the government's unauthorized screening of the films without a warrant violated the Fourth Amendment. Mr. Justice White joined by Mr. Justice Brennan concurred but also held that the subsequent screening by the government was an independent governmental search without regard to the previous private screening and agreed that even if the private parties had projected the films before turning them over to the government, the government still would have been required to obtain a warrant for its subsequent screening of them. (See conc. opn. ___ U.S. ____, 100 S.Ct. 2404.)

would remain private. The partial invasion of privacy by customs did not automatically justify a total invasion. In the words of Walter (___ U.S. _____, _____, 100 S.Ct. 2395, 2403):

> "It did not simply strip the remaining unfrustrated portion of [the] expectation of all Fourth Amendment protection." (Fn. omitted.)

Of course, the expectation of privacy means more than a subjective expectation. The expectation must be reasonable. Under the present standards enunciated in Chadwick, Sanders, Minjares, Dalton (United States v. Chadwick, supra, 433 U.S. 1; Arkansas v. Sanders (1979) 442 U.S. 753; People v. Minjares, supra, 24 Cal.3d 410; People v. Dalton (1979) 24 Cal.3d 850) and their respective progeny, we cannot say that the expectation here was unreasonable. Under the factual circumstances present in this case, we conclude there was a justifiable expectation of privacy against unwarranted intrusion. Essentially an important element in these cases is foreseeability which is implicit in an analysis of subjective expectations. Here, the government should have anticipated a reasonable claim of privacy. (See United States v. Rivera (N.D. Tex. 1980) 486 F.Supp. 1025, 1034.)

Rather than placing on the law enforcement officer on the street the difficult, if not impossible burden, of carrying a list of "searchable parcels," we believe that the standard to be followed by the officer is the one which was succinctly stated by Federal Judge Higginbotham in Rivera, supra, idem as follows:

> ". . . If the contents of a sealed package or parcel are not revealed by the package and you have exclusive control with no fear of harm from its contents -- obtain a warrant." (Emphasis added.)

The packages were no longer subject to a warrantless search once they were delivered. (See People v. Whyte (1979) 90

Cal.App.3d 235; but see United States v. Bulgier (7th Cir. 1980) 618 F.2d 472.) This is particularly true when as here considerable time had passed and the packages had been transported such a distance by the recipients or others. Not only had a considerable period passed from the time the vehicle left Merced and was finally stopped and the packages seized, but additional time (some four to five hours) also passed after the seizure of the packages and their subsequent opening at Merced.

The Attorney General argues that the warrant obtained for the house should be adequate to authorize the opening of the sealed packages. We are not persuaded. The warrant which was obtained did not authorize (and properly could not so authorize under the Fourth Amendment) seizure of the packages at any place where found.

Nor do we believe that the police were entitled to search the seized packages without a warrant because "their contents could be inferred from their outward appearance." (Arkansas v. Sanders, supra, ____ U.S. _____, 99 S.Ct. at 2593, fn. 13.[2/]) The fact that the police had ample probable cause to believe and perhaps even knew that the packages contained contraband does not mean their contents were apparent from the outside.

2/ The footnote reads:
"Not all containers in packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to 'plain view' thereby obviating the need for a warrant. [Citation.] There will be difficulties in determining which parcels taken from an automobile require a warrant and which do not." (Emphasis added.)

The meaning of the somewhat cryptic[3/] footnote in Sanders need not concern us in this case. This is factually not a situation where the packages "by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance."

The vehicle here was properly stopped and the packages were properly seized. However, the fact that the packages were lawfully seized does not validate a warrantless search of the contents. While there was ample probable cause for the police officer's belief that the packages contained contraband, there were no exigent circumstances justifying the failure to secure a warrant for the search of those packages.

Some may consider the warrant requirement to be unnecessary surplusage in this situation. However, "a warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation.'" (Mincey v. Arizona (1978) 437 U.S. 385, 393.) As the California Supreme Court said in People v. Minjares, supra, 24 Cal.3d 410, 420-421:

> "When those circumstances cease to exist the exception also ceases to exist and a warrant must be obtained. This is the rationale of Chadwick: 'Even though on this record the issuance of a warrant by a judicial officer was reasonably predictable, a line must be drawn. In our view, when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority.' ([Citation], italics added.) To hold otherwise would exalt the exceptions above the rule." (Fn. omitted.)

3/ It is not clear from the Sanders footnote whether or not the United States Supreme Court in the italicized sentence (see fn. 2, supra) is really making an exception to the requirement of a warrant substantially different from the "plain view" exception. Perhaps, it is merely an extension of the "plain view" exception.

The same viewpoint is set forth by our Supreme Court in People v. Dalton, supra, 24 Cal.3d 850, 860:

> "The warrant requirement is not an empty formality. It is the cornerstone of the Fourth Amendment's guarantee of the right to privacy. The assurance that a determination of probable cause will be made by a neutral and detached magistrate, rather than an officer under stress in the field is not a minor guarantee. [Citation.] The authority of the executing officer and his need to search are carefully reviewed. [Citation.] Limits are imposed on the search through the requirement of particularity. [Citation.] And the factual basis on which the affiant is justifying the search is made in advance of the search itself. This ensures that a search will not be impermissibly justified by what it turns up. [Citation.] These important protections would be undermined by the adoption of a rule that would encourage officers to conduct a search at the time of the seizure of personal effects, rather than requiring them to obtain a warrant. [Citations.]"4/

4/ One of the citations in Dalton is to the United States Supreme Court opinion in Johnson v. United States (1948) 333 U.S. 10, 13-14. While that quote has been often set forth in full (see, for example, Chapman v. United States, (1961) 365 U.S. 610, 614-615), the statement written by Mr. Justice Jackson over 32 years ago still bears repeating in full. It reads:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent." (Fn. omitted.)

In examining the record in this case, we find no exigent circumstances that would authorize a warrantless search of the packages. The motion to suppress should have been granted. Whether or not there remains sufficient evidence to retry Riegler is a matter initially for the prosecution, and we express no opinion thereon at this time.

The Attorney General argues that the suggested procedure in People v. Haybron (1980) 108 Cal.App.3d 31, footnote 2, should be applied here and the container could be brought into court and then opened under judicial authorization. That suggested procedure was completely unnecessary to the decision in Haybron. Additionally Haybron arose in a Penal Code section 995 setting and the court concluded at page 40 that even in the absence of the evidence obtained via the warrantless search there was probable cause to hold the defendants to answer. Furthermore, the suggested procedure does not consider the facts of the Fourth Amendment violation. The thrust of the container cases is to prevent warrantless searches. The Haybron procedure, in effect, would turn the rule on its head and circumvent the Fourth Amendment violation. We reject the use of such a procedure in this case.

In light of our conclusion we need not consider any other contention of error made by Riegler.

The judgment is reversed.

Hopper J.

I CONCUR:

P.J.

SEE CONCURRING OPINION

THE PEOPLE v. ROBERT LAWRENCE RIEGLER

5 Crim. No. 4230

CONCURRING OPINION BY ANDREEN, J.

I concur because of the authority of People v. Whyte (1979) 90 Cal.App.3d 235, but write to express a question as to the wisdom of the law stated therein.

The majority in this case holds that the seizure of the packages was proper, but that a subsequent search of the contents could only follow the issuance of an additional warrant. The People's argument that defendant had a lesser expectation of privacy because the packages were subject to a customs search is rejected. It is difficult to understand why. Once it was determined that the material was contraband, the packages could move through the U.S. Mail only by virtue of governmental authorization.

If it were not for Whyte, I would argue that the packages were in the constructive possession of law enforcement from the time of the opening of them at JFK Airport until the stop in Contra Costa County. For an example of this approach, see United States v. DeBerry (2d Cir. 1973) 487 F.2d 448. It is recognized that the argument for constructive possession is weakened once there was a delivery of the material to the Fortner residence in Merced. The problem is not insurmountable, however, if one remembers that the authorities had a

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right to immediate seizure of the packages. They delayed that act in a commendable attempt to increase the size of their catch, but their immediate right to possession gave them continued constructive control.

I think that the approach in DeBerry would simplify the task of law enforcement without derogating from the values protected by the Fourth Amendment's prohibition of unreasonable searches and seizures.1/

Andrews J.

1/ "'"My basic premise is that Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be "literally impossible of application by the officer in the field."' LaFave, "Case-by-Case Adjudication" versus "Standardized Procedures": The Robinson Dilemma, 1974 Sup.Ct.Rev. 127, 141 (footnotes omitted), quoting United States v. Robinson, 153 U.S.App.D.C. 114, 154, 471 F.2d 1082, 1122 (1972) (dissenting opinion), rev'd, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973).'" (United States v. Chadwick (1977) 433 U.S. 1, 22, fn.3 (dis.opn. of Blackmun, J.).)

PROOF OF SERVICE

I am a citizen of the United States and am employed in the County of Alameda, State of California; I am over the age of eighteen years and not a party to the within above-entitled action; my business address is 2000 Center Street, Suite 303, Berkeley, California 94704.

On May 10, 1982 I served the within RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI on the attorneys for Petitioner in said action by placing three true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at Berkeley, CA, addressed as follows:

MR. GEORGE DEUKMEJIAN,
Attorney General
State of California

MR. ROBERT H. PHILIBOSIAN,
Chief Assistant Attorney General
Criminal Division

MR. ARNOLD O. OVEROYE
Assistant Attorney General

MR. RAMON M. de la GUARDIA
Deputy Attorney General

555 Capital Mall, Suite 350
Sacramento, California 95814

I, PATRICIA A. PATTERSON, declare under penalty of perjury that the foregoing is true and correct. Executed this 10th day of May, 1982 at Berkeley, California.

Patricia A. Patterson
PATRICIA A. PATTERSON

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MAY 13 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 81-1916

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

ROBERT LAWRENCE RIEGLER,

Respondent. /

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

(28 U.S.C. §1915, Rule 46)

Respondent, ROBERT LAWRENCE RIEGLER, by and through his attorney, EUGENE SELTZER, moves the Court for an order permitting him to proceed in forma pauperis, pursuant to the provisions of Title 28, United States Code, Section 1915, and in support thereof attaches the affidavit of said appellant.

Respondent, ROBERT LAWRENCE RIEGLER, was previously permitted leave by this Court to proceed in forma pauperis when the matter arising from the same action came before this Court in Action No. 80-1421, October Term, 1980.

Dated: May 3, 1982

DUANE, LYMAN & SELTZER

EUGENE SELTZER,
Attorney for Respondent

NO. 81-1916

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

ROBERT LAWRENCE RIEGLER,

Respondent. /

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, ROBERT LAWRENCE RIEGLER, being first duly sworn, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed in the above-entitled matter without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues raised by the petition for writ of certiorari have been raised by the State of California appearing through the Attorney General of that state.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in the above-entitled matter are true.

1. Are you presently employed?

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

Yes. Self-employed as of 3-15-82. No profits todate.

b. If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received.

see section a.

2. Have you received within the past twelve months any income from a business, profession, or other form of self-employment or in the form of rent payments, interest, dividends, or other source? Worked for Curry Company, Yosemite during 1981 with gross wage of $10,285.00. Net after taxes, $8,000.00.

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

see above

3. Do you own any cash or checking or savings account?

no.

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? 1953 Chevrolet pick-up truck, value $500.00. 1975 Norton Motorcycle, value $1,500.00.

a. If the answer is yes, describe the property and state its approximate value.

see above

5. List the persons who are dependent upon you for support and state your relationship to those persons.

none

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Dated: 7-27-82

Robert Lawrence Riegler
ROBERT LAWRENCE RIEGLER

STATE OF CALIFORNIA)
COUNTY OF Los Angeles) ss.

On April 27, 1982, before the undersigned, a Notary Public for the State of California, personally appeared ROBERT LAWRENCE RIEGLER, known to me to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same.

Juanita Hammon
J. Hammon

OFFICIAL SEAL
JUANITA HAMMON
NOTARY PUBLIC-CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires October 29, 1984

PROOF OF SERVICE BY MAIL

I, Patricia A. Patterson, declare that I am a citizen of the United States and employed in the County of Alameda.

I am over the age of eighteen years and not a party to the within above-entitled action; my business address is 2000 Center Street Suite 303, Berkeley, CA 94704.

On May 3 , 1982 I served the within MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS; attached AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

on the Attorneys for Petitioner in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States Post office mail box at Berkeley, California, addressed as follows:

George Deukmejian,
Attorney General of the State of California
Robert H. Philibosian
Arnold O. Overoye
Eddie T. Keller
Ramon M. de la Guardia
555 Capitol Mall, Suite 350
Sacramento, California 95814

I certify under penalty of perjury that the foregoing is true and correct.

Executed on May 3, 1982 at Berkeley, CA.

Patricia A. Patterson

PATRICIA A. PATTERSON